YAPP YUK TSHIN

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CRIMINAL APPEAL NO. 20 (B) OF 1990]
13 JUNE 1991

CRIMINAL PROCEDURE: *Section 4(c) Prevention of Corruption Act 1961 (Law of Malaysia Act No. 57) - Appeal against conviction whether weight of evidence - Burden of proof - Character - Whether argument against the conviction whether to take effect -Whether be considered - Mens rea at time of actus reus.*

The appellant was found guilty on a charge under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57) and convicted. He was bound over for good behaviour for a period of 12 months. Appellant appealed against conviction. The PP cross-appealed against sentence.

Appellant's Counsel argued against conviction and stated that the learned Sessions Court Judge's conclusion were either due to miscomprehension of the evidence, failure to appreciate the evidence, drawing wrong inferences or giving undue weight to prosecution evidence. Appellant's also argued against sentence and submitted that the character and good standing of the appellant should have been considered.

Held:

[1] The learned Sessions Court Judge had meticulously dealt with the evidence and the laws and the Court support his findings and affirm the conviction.

[2] Character though important cannot displace evidence of wrongdoing. Good character should be best left as a mitigating factor and not as a ground to cleanse any transgression against the law.

[3] Although corruption is a serious offence, this must have been impressed with the character and antecedents and the Courts take into consideration the future impact of custodial sentence on an accused.

[Appeal against conviction and sentence dismissed. Appellant to pay RM1,000 as a portion of the costs of Prosecution or serve four months in prison in lieu thereof.]

Cases referred to:

Mat v. PP [1963] 18 MLJ 186 ***(cons)***
Lee Sang Cheah v. Rex [1946] 12 MLJ (SSR) 22 ***(cons)***
Sheo Swarup v. King Emperor IA 398 ***(cons)***
Sultan Mohamed v. R. [1952] 18 MLJ 186 ***(foll)***
Vijayaratnam v. PP [1962] 28 MLJ 106 ***(foll)***
Tan Puan Chee v. PP [1981] 2 MLJ 282 ***(foll)***
Syed Ismail v. PP [1967] 2 MLJ 282 ***(dist)***
Liew Kaling & Ors. v. PP [1960] 26 MLJ 306 ***(cons)***
Rex v. Grondkowski [1946] 1 KB 369 ***(foll)***
Hiller v. Minister of Pensions [1947] 2 All ER 372 ***(cons)***

Legislation referred to:

Criminal Procedure Code, ss. 294(i), (ii), 422, 432
Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57), s. 4(c)

For the appellant - Chau Chin Tang; M/s. Chau & Thien
For the respondent - Selvanathan a/l Shanmugham

JUDGMENT

Syed Ahmad Idid JC:

The appeal on 13 June 1991 was against the decision of the learned Sessions Court Judge at Kota Kinabalu delivered on 6 September 1989 whereby the appellant was found guilty on a charge under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57) and convicted. Appellant was bound over for good behaviour for a period of 12 months in the sum of RM3,000. The PP was dissatisfied with the sentence and cross-appealed.

The DPP from the Anti-Corruption Agency (Mr. Selvanathan a/l Shanmugham) represented the respondent while Mr. Chau Chin Tang appeared for the appellant.

The appellant, who was dissatisfied with the decision, gave these grounds to support his appeal to quash the conviction:

(1) that the learned Sessions Court Judge misdirected himself:

  (i) on the burden of the accused person when he required supportive evidence relating to the attempts by the appellant to retrieve the claim two or three days after it had been submitted:

  (ii) in failing to consider the appellant's good character:

(2) and that the conviction was:

  (i) contrary to clear and unambiguous evidence on record: or

  (ii) due to the learned Sessions Court Judge's failure to appreciate the practice adopted by the account section at SEB to return irregular/false documents, as such a practice had a significant bearing upon the mind and conduct of the petitioner: and

(3) that the decision to convict was against the weight of evidence.

The evidence showed that:

(i) the appellant approached Alexander Kong Fui Pen of the Juru Letrik Garuda Sdn. Bhd. and asked for two invoices, each for RM1,720 in respect of "transportation and labour charges" on 5 January 1987 and 30 March 1987:

(ii) Alexander Kong who provided the invoices and dated them 15 January 1987 and 8 April 1987 respectively, told ACA officers that he felt "obliged to do this since he (the appellant) was my ex-colleague and he could make things difficult for me ... and our company project are connected with the SEB":

(iii) the appellant submitted the two invoices with his "Waran Perjalanan dan Tuntutan" and claimed for payment:

(iv) the appellant tried to retrieve his claims a few days after submission but these were not returned to him:

(v) on 26 July 1987 an ACA officer lodged a police report suggesting that the appellant had submitted "tuntutan pertukaran mengandungi butir-butir palsu pada bulan Januari 1987".

(vi) appellant was then arrested and charged (and convicted).

The learned Counsel for the appellant tried to show to the Court that the reasons leading to the conclusion of the learned Sessions Court Judge were either due to miscomprehension of the evidence, failure to appreciate the evidence, drawing wrong inferences or giving undue weight to prosecution evidence. Mr. Chau submitted that the learned Sessions Court Judge did not approach the defence according to the well established principle laid down in *Mat v. PP* [1963] 29 MLJ 263 where Suffian J (as he then was) suggested to Magistrates that if they "accept the explanation given by or on behalf of the accused, then you must acquit.

In answer to that the learned DPP called into support the cases of:

(i) *Lee Sang Cheah v. Rex* [1946] 12 MLJ (SSR) 22:

(ii) *Sheo Swarup v. King Emperor* Ind. App. 398.

The argument can be laid to rest by the learned Sessions Court Judge who at page of the appeal record (fourth para.) had this to say:

> For the reasons earlier expressed I find for a fact the accused had when he submitted the two invoices which contained false particulars in support of his claim intended to mislead and deceive his principal. ***As such all the essential elements of the offence have been proved. I do not believe the accused's evidence neither does it raise a reasonable doubt in my mind as to his guilt or as to the truth of the prosecution's case***. I am left with absolutely no doubt that the defence has failed to raise a reasonable doubt in the prosecution case.
> (Emphasis added)

This would mean that s. 422 of the Criminal Procedure Code can come into play as the evidence adduced by the prosecution, in the mind of the learned Sessions Court Judge, was overwhelming.

Should the Sessions Court Judge consider (and accept?) the whole submission made by the defence? He is bound to consider and study the whole evidence (*Sultan Mohamed v. R.* [1952] 18 MLJ 186) and on the records the learned Sessions Court Judge showed he did study the whole evidence. In *Sultan Mohamed's* case the Counsel for the appellant complained that the grounds of judgment were meagre whereas here the learned Sessions Court Judge supplied various reasons or grounds. I do not think there was insufficiency of thoughts on each of the matters that had been taken into consideration. See also *Vijayaratnam v. PP* [1962] 28 MLJ 106 and *Tan Puan Chee v. PP* [1981] 2 MLJ 282. The grounds of judgment of the learned Sessions Court Judge meticulously complied with the requirements of these three cases.

Character is important but it cannot displace evidence of wrongdoing. Notwithstanding the decision in *Syed Ismail v. PP* [1967] 2 MLJ 125, this Court is of the view that men of good character do commit crimes: there is always (so agreed the learned Counsel for the appellant in the appeal) the first time. Good character is best left as a mitigating factor and not baited as a ground to cleanse any transgression against the law.

One other item which the appellant wished the Court to consider was that three witnesses PW8, PW9 and DW9 had agreed that the appellant was "entitled" to transport allowance. So on that appellant sought to be excused for the crime...unfortunately there was no provision in the law to excuse offenders merely on the grounds others are of like minds. Mr. Chau admitted that what the three witnesses were saying was this: "If the falsity of the document (i.e. the two invoices) was brought to their knowledge, they would not have approve the claims, otherwise they were not bothered".

On the whole, the fact that the appellant who graduated with a Bachelor of Science (Electrical Engineering) degree, can add to the finding that he knew what he did was wrong. Hence, the existence of *mens rea* at the time of the *actus reus* at on the date he submitted the claim with the false invoices. *Liew Kaling & Ors. v. PP* [1960] 26 MLJ 306 dealt with the test of "proved", i.e. the test of the prudent man according to the "circumstances of the particular case". Any question such as "was it not likely for the appellant to think that upon production of the transfer order and supporting documents, he was entitled?" should be answered in the negative.

The Court reminded itself of what Lord Goddard CJ said in *Rex v. Grondkowski* [1946] 1 KB 369:

> The Judge must consider the interest of justice as well as the interest of the prisoners. It is too often nowadays thought or seems to be thought that the interest of justice means only the interest of the prisoners.

As the old maxim has it:

> Minatur innocentes, qui parcil noncentibus.

It was Counsel's duty to defend the client: it was equal on the side of the prosecution to prove its case except that the tasks of the defence was easier, i.e. to tilt the scale of justice slightly. It was then the duty of the Courts to see that justice was done or that the intention of the legislature was interpreted to cure an ill or remedy a wrongdoing or plug a loophole.

As Mr. Chau had dealt at length on the questions of burden of proof, let me quote two passages:

(i) the judgment of Denning J (as he then was) in the case of *Hiller v. Minister of Pensions* [1947] 2 All ER 372 at p. 373 where his lordship described the degree of proof required in criminal cases:

> That degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

This Court finds that when the appellant approached Alexander Kong, his mind was already set on his claiming the reimbursement. I cannot admit the fanciful possibility that retrieval was what he had in mind. Such acceptance would deflect the course of justice.

(ii) The second passage is from the summing-up of Lord Hewart CJ in *Podmore's* case 22 Cr. App. R. 36 where his lordship used the phrase "beyond reasonable doubt" and then he went on to say:

> You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase. What it means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of clearing a difficulty, but such a doubt as would govern a man's course of action in some private affair or moment of his own.

It was manifest that in the moment of Cyril Yapp's own, he tendered the claim and sought payment for something he was not entitled to. He was entitled to reimbursement which meant that if he had made payment in connection with his transfer, e.g. to transport his belongings,

then the SEB would have to reimburse him either in full or to the limit imposed. The learned Sessions Court Judge had meticulously dealt with the evidence and the laws and I can only support his findings by dismissing the appeal, which I now do, against conviction. I therefore affirm the conviction.

As regards the sentence, I shall now hear the arguments by the learned DPP and Datuk Chau.

After Argument and Submission on the Sentence

I have heard both the learned DPP and learned Counsel and it does not appear to me in this case there is ground to sympathise with the appellant.

The learned Sessions Court Judge must have been impressed with the appellant's character and antecedents to have released him on his entering a bond. The appellant's regular attendance in Court is sufficient for me to agree with the learned Sessions Court Judge on this aspect and to aspect learned Counsel's contention.

Corruption is a serious offence but Courts do take into consideration the future impact of custodial sentence on an accused. As a mitigating factor, I accept that the administration in the SEB was not of a high standard based on what the learned Counsel for the appellant had informed the Court. For that I shall confirm the learned Sessions Court Judge's sentence of he appellant under s. 294(i) of the Criminal Procedure Code.

But I now direct that, in addition, the appellant will pay RM1,000 as a portion of the costs of the prosecution. This is allowed by s. 294(ii) read with s. 432 of the Criminal Procedure Code. If the RM1000 is not paid the appellant will serve four months in prison.

Also found at [1992] 2 CLJ 1095